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Directive 91-2: Application of Deeds Excise to Transfers by certain Federally Sponsored Corporations

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ISSUE:

Does the Massachusetts Deeds Excise apply to transfers of realty located in the Commonwealth by written instrument by the following federally sponsored corporations:

Resolution Trust Corporation (RTC);
Federal Home Mortgage Corporation (Freddie Mac);
Federal National Mortgage Association (Fannie Mae); Government National Mortgage Association (Ginnie Mae)?

DIRECTIVE:

The Massachusetts Deeds Excise does not apply to transfers of realty in Massachusetts by written instrument by the RTC, Freddie Mac, Fannie Mae and Ginnie Mae which are made in accordance with their statutory obligations. The RTC is a federal agency and is therefore exempt by the express language of the Massachusetts statute. Freddie Mac, Fannie Mae and Ginnie Mae are exempt from the Massachusetts Deeds Excise because each of the above federally sponsored corporation is exempt from state taxation by federal statute. Moreover, the Massachusetts Deeds Excise cannot be imposed on the grantee of the written instrument where the grantor is one of these mentioned federally sponsored corporations.

DISCUSSION OF LAW:

I. Massachusetts Deeds Excise

Massachusetts imposes an excise on the transfer of any deed, instrument, or other writing whereby realty is conveyed to a purchaser. G.L. c. 64D, § 1. The excise is based on the consideration given for the property and applies whenever the consideration, exclusive of the value of any lien or encumbrance remaining on the property, is greater than \$100. Id. The excise is paid by the person making or signing the deed, i.e., the grantor, and is evidenced by a stamp affixed to the instrument. Id., § 2. The provisions of G.L. c. 64D do not apply to any instrument or writing given to secure a debt or to any deed, instrument, or writing to which the Commonwealth or the United States or any of their agencies are a party. Id., § 1.

The Deeds Excise is not a property tax, but is an excise on a "commodity," within the meaning of Part II, c. 1, § 1, art. 4 of the Constitution of Massachusetts. See *Lustwerk v. Lyton, Inc.*, 344 Mass. 647, 651 (1962). The Deeds Excise is a tax "imposed on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege," rather than directly on the property itself. *Rosenow v. Illinois Department of Revenue*, 715 F.2d 277, 279 n. 4 (7th Cir. 1983).

II. Federally Sponsored Corporations

A. Resolution Trust Corporation (RTC)

The RTC was established by Congress to manage and resolve all cases involving depository institutions whose accounts were insured by the Federal Savings and Loan Insurance Corporation or for which a conservator or receiver had been appointed by the Federal Deposit Insurance

Corporation. 12 U.S.C. 1441a(b)(3). The RTC is the receiver for such depository institutions that fail between January 1, 1991, and August 9, 1992, and terminates its operation on December 31, 1996. See 12 U.S.C. § 1441a(b)(6);(o).

The RTC is an instrumentality of the United States, 12 U.S.C. 1441a(b)(1)(A), and is deemed to be an "agency" of the United States when it is acting as a conservator or receiver of an insured depository institution, 12 U.S.C. 1441a(b)(1)(B). The full faith and credit of the United States is pledged to the payment of any obligation issued by the RTC with respect to both principal and interest. 12 U.S.C. § 1441a(j)(3).

Except on its real property, the RTC is expressly exempted from state and local taxation by 12 U.S.C. § 1441(g), which provides that the "[RTC] ...capital, reserves, surpluses, and assets of the Corporation ...and the income derived from such capital, reserves, surpluses, or assets shall be exempt from State, municipal, and local taxation except taxes on real estate held by the Corporation, according to its value as other similar property held by other persons is taxed." 12 U.S.C. 1441(g).

B. Federal Home Mortgage Corporation (Freddie Mac)

Freddie Mac was established by Congress for the purpose of purchasing and selling residential mortgages with a view of encouraging home ownership. 12 U.S.C. § 1454(a)(1). It typically purchases mortgages from institutions originating the loans, thereby replenishing lenders' cash positions so that they can write new loans. To a small extent, Freddie Mac purchases mortgage loans to hold in its portfolio, but more commonly purchases mortgage loans, places them in pools, and issues pass-through certificates backed by these mortgage loans.

Freddie Mac is not a regularly constituted branch of government. It is "a body corporate operated under the direction of a board of directors" that determine the "general policies that govern the operation of the corporation." 12 U.S.C. § 1452(a)(1).

Except on its real property, Freddie Mac is exempt from state and local taxation by federal statute, specifically, 12 U.S.C. § 1452(d), which provides that "[Freddie Mac], including its franchise, activities, capital, reserves, surplus, and income, shall be exempt from all taxation now or hereafter imposed by any State, county, municipality, or local taxing authority, except that any real property of the Corporation shall be subject to State,, or local taxation to the same extent according to its value as other real property is taxed." 12 U.S.C. § 1452(d).

C. Federal National Mortgage Association (Fannie Mae)

The Congress established the Federal National Mortgage Association in 1938 to provide a secondary market for federally underwritten mortgages. Fannie Mae was once part of the federal government, 12 U.S.C. § 1716, but it was separated in 1968 [1](#) and now is fully owned by private investors. 12 U.S.C. § 1716b.

Like Freddie Mac, Fannie Mae is not a regularly constituted branch of government. It is a "body corporate" operated under the direction of a board of directors that "determine the general policies which govern the operations of the corporation." 12 U.S.C. § 1723(b).

Except on its real property, Fannie Mae is expressly exempted from federal, state, and local taxation by 12 U.S.C. 1723a(c)(2), which provides that "[Fannie Mae], including its franchise, capital, reserves, surplus, mortgages or other security holdings, and income shall be exempt from all taxation now or hereafter imposed by the United States,, or by any State, county, municipality, or local taxing authority, except that any real property of [Fannie Mae] shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed." 12 U.S.C. § 1723a(c)(2).

D. Government National Mortgage Association (Ginnie Mae)

Whereas Fannie Mae is a government sponsored private corporation, Ginnie Mae remains in the government - Ginnie Mae is part of the Department of Housing and Urban Development. 12 U.S.C. § 1716b. Ginnie Mae is "a body corporate without capital stock" within the Department of Housing and Urban Development. 12 U.S.C. § 1717(a)(2)(B). All powers, duties, and administration of Ginnie Mae are vested in the Secretary of Housing and Urban Development. 12 U.S.C. § 1723(a). The Secretary determines the general policies that govern the operation of Ginnie Mae. *Id.*

Ginnie Mae operates as a secondary market facility. Its purpose is to manage and liquidate federally owned mortgage portfolios in an orderly manner with a minimum adverse effect on the home mortgage market and minimum loss to the federal government. 12 U.S.C. 1721(c).

Except on its real property, Ginnie Mae is expressly exempted from federal, state, and local taxation by 12 U.S.C. 1723a(c)(1), which provides that "[Ginnie Mae], including its franchise, capital, reserves, surplus, mortgages or other security holdings, and income shall be exempt from all

taxation now or hereafter imposed by the United States,, or by any State, county, municipality, or local taxing authority, except that any real property of [Ginnie Mae] shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed." 12 U.S.C. § 1723a(c)(1).

III. Analysis

The Deeds Excise does not apply to "any deed, instrument or writing to which ... the United States ... or any of [its] agencies is a party." G.L. c. 64D, § 1. The Department of Revenue has relied on the two prong test set out in *First Agricultural National Bank v. State Tax Commission*, 333 Mass. 172, rev'd on other grounds, 392 U.S. 339 (1968), for determining whether an organization is an "agency" of the United States. See e.g. Letter Rulings 81-23, 82-54, 84-32. Under the First Agricultural two pronged test, an organization is an "agency" of the United States if it is either (1) a regularly constituted department of government or (2) an entity wholly owned by the government and which exercises exclusively governmental functions. *Id.* at 172.

Of the federally sponsored corporations described above, only the RTC comes within the express exemption of G.L. c. 64D, that is, the RTC is exempt from the Deeds Excise because of its status as an "agency" of the United States. The RTC is an "agency" of the United States when it is acting as a receiver or conservator of an insured depository institution. 12 U.S.C. § 1441a(b)(1)(A)(B). Thus, the RTC is a "regularly constituted department of government" under the First Agricultural test. The Massachusetts statute exempts any realty transferred by written instrument to which an "agency" of the United States is a party from the Deeds Excise - meaning, the Deeds Excise cannot be imposed on either the grantor or grantee where one of the parties to the transfer is an "agency" of the United States. See G.L. c. 64D, § 1.

Freddie Mac, Fannie Mae, and Ginnie Mae are not "agencies" of the United States government, and, thus, do not come within the express exemption from the Deeds Excise as provided by G.L. c. 64D, § 1. Nevertheless, the transfer of realty by written instrument by all three federally sponsored corporations as part of their statutory obligations as secondary market facilities are exempt from the Deeds Excise because of the exemption from state and local taxation provided to each by federal statute. Moreover, the Deeds Excise cannot be imposed on the grantee where the grantor is one of the three federally sponsored corporations mentioned above.

/s/Mitchell Adams
Mitchell Adams
Commissioner of Revenue

September 19, 1991

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Footnotes:

1. In 1968, the Federal National Mortgage Association was partitioned into two separate and distinct corporations. One such corporation, the Federal National Mortgage Association (Fannie Mae) is a government sponsored private corporation; the other, Government National Mortgage Corporation (Ginnie Mae) is a government corporation remaining in the federal government. 12 U.S.C. 1716b.